IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

IOWA RIGHT TO LIFE COMMITTEE, INC.,	:	
Plaintiff,	:	
vs.	:	Case No. 4:10-cv-00416
TOM MILLER, et al,	:	HEARING TRANSCRIPT
Defendants.	:	

Courtroom, Second Floor
U.S. Courthouse
East First and Walnut Streets
Des Moines, Iowa
Wednesday, September 15, 2010
9:00 a.m.

BEFORE: THE HONORABLE ROBERT W. PRATT, Chief Judge.

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ANN T. MOYNA - CERTIFIED SHORTHAND REPORTER

APPEARANCES:

For the Plaintiff:
KAYLAN L. PHILLIPS, ESQ.
JARED HAYNIE, ESQ.
Bopp, Coleson & Bostrom
One South Sixth Street
Terre Haute, Indiana 47808

BRIAN P. RICKERT, ESQ.
ADAM C. GREGG, ESQ.
Brown, Winnick, Graves, Gross,
Baskerville & Schoenebaum
666 Grand Avenue, Suite 2000
Des Moines, Iowa 50309

For Defendant Miller:
JEFFREY S. THOMPSON, ESQ.
MATT GANNON, ESQ.
Assistant Attorneys General of Iowa
Hoover State Office Building
Second floor
Des Moines, Iowa 50319

For Defendant Sarcone:
MICHAEL BERNARD O'MEARA, ESQ.
Assistant Polk County Attorney
111 Court Avenue
340 Polk County Administration Bldg.
Des Moines, Iowa 50309-0515

I N D E X

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P R O C E E D I N G S

MR. MESSINA: Your Honor, the case before the Court this morning is 4:10-cv-416, Iowa Right to Life Committee, Inc., versus Miller, et al.

Counsel, please enter your appearances for the record.

MR. RICKERT: Your Honor, Brian Rickert from the Brown Winnick firm on behalf of Plaintiff.

MR. HAYNIE: Jared Haynie.

MS. PHILLIPS: Kaylan Phillips, Bopp, Coleson and Bostrom, on behalf of Plaintiff.

MR. THOMPSON: Your Honor, Jeff Thompson for the State, Defendants. And with me is Matt Gannon, who is not admitted to this Court, but I have asked him to sit with me today because he represents the Commission, with permission of the Court.

THE COURT: All right.

MR. O'MEARA: Michael O'Meara on behalf of Defendant John Sarcone, Polk County Attorney.

THE COURT: Okay. Thank you very much.

Before we start your lawsuit and, I don't know, Mr. Rickert, are you the person I should recognize on behalf of the plaintiff, or Mr. Haynie, or Ms. Phillips?

MR. RICKERT: Ms. Phillips will be arguing today.

THE COURT: Your lawsuit arrived the same day my new law clerk did, for which she'll thank you later I'm sure.

In any event, Mr. Thompson knows this, but I haven't discussed it with the defense counsel because I thought it would be an ex parte communication. Her spouse is a lawyer who started the same day you filed your lawsuit at the Attorney General's Office. Their previous work involved much the same situation; her spouse was a law clerk in the Northern District of Illinois, she was a lawyer in a large law firm in the district.

I have done some research under 28 USC 455. I don't think it's a conflict.

Mr. Thompson, I'm assuming you know this, and so I thought we should put it on the record. My understanding is that my law clerk's spouse isn't involved in this lawsuit. I need to know on the record if that's the case. You might describe for counsel the way your division works. You can't be here as long as I have and not do a lot of work with your office, so I know that you parse out your work based on divisions or departments. I don't know, but we should make some record of this.

MR. THOMPSON: I think we should. For the record, what's the name of your clerk's spouse, Your Honor?

THE COURT: My clerk is Sara Burstein, B-U-R-S-T-E-I-N. I believe her spouse is Daniel Burstein, if I recall correctly.

MR. THOMPSON: We are talking about the same employee.

THE COURT: Yes.

MR. THOMPSON: Dan did join our office. He is in a totally separate division from the civil division over which I manage. This lawsuit, both because of its nature as a civil matter, but also just because of its importance, is being staffed, frankly, the people who worked on the lawsuit are sitting here, in addition to our Solicitor General, Mark Shaw. Absolutely he has not and will not work on this matter.

THE COURT: Okay. Ms. Phillips, do you want to make any record?

MS. PHILLIPS: As far as we can tell that's fine. As long as he is sufficiently walled off from this case we have no objection.

THE COURT: Okay. I did want you to know that I looked at the Code of Conduct Advisory Opinion No. 38. This has happened, obviously, before regarding spouses who have had conflicts like that in the past. The Committee on the Code of Conduct issue, Advisory Opinion 38, as well as Advisory Opinion 51, and if either side wants to see that, my chambers can provide it for you.

In any event, Ms. Phillips, I, like you, probably read the defendants' submission last night, and so I suppose the place we ought to start is if you have some response you want to make or any comment on their filing, you may do so.

MS. PHILLIPS: My response will be included within my

presentation, if that's sufficient.

THE COURT: Okay. That will be fine.

All right. Ms. Phillips, you may proceed, since it's your burden.

MS. PHILLIPS: May it please the Court.

THE COURT: Ms. Phillips.

MS. PHILLIPS: My name is Kaylan Phillips, and I represent Plaintiff, Iowa Right to Life. Several members of the board, as well as the executive director, are in attendance today.

To begin I would like to explain what Citizens United did. Citizens United said that the corporate forum does not pose a threat so that you may not regulate a corporation just because it's a corporation.

At issue in Citizens were two types of regulations. The first included what is known as PAC-style burdens. These require registration, ongoing reporting, termination, other onerous requirements. The Court subjected these requirements to strict scrutiny and found they were unconstitutional.

The second type at issue in Citizens United were disclosure requirements. In Citizens those were event driven reporting, disclaimer reporting. As to those types of reports the Court applied exacting scrutiny and found that those were constitutional. That's what was at issue in part four of Citizens United.

Here we're talking about the first type, we're talking about the types of burdens that are subject to strict scrutiny, these PAC-style burdens. We're not talking about disclosure in general. Disclosure is fine. We do not have a problem with disclosure. We have a problem with this type of regulation that is above and beyond what is federally allowed under the disclosure scheme approved in Citizens.

Here Iowa imposes political committee status on groups that do not have the major purpose of nominating or electing candidates. Determining political committee status is subject to strict scrutiny under Citizens United 298 and also Day v. Holahan 1363.

Under Buckley, MCFO, and other Supreme Court cases, PAC status, political committee status, may only be imposed on organizations that are either under the control of the candidate, or the major purpose of which is the nomination or election of a candidate.

This major purpose test is a bright line test. This has also been approved by circuit courts in examining state law. Specifically in the Fourth Circuit, North Carolina v. Leake, it's from 2008, and also most recently New Mexico Youth Organized versus Herrera. That was back in June.

Under this current scheme Iowa Right to Life is not only an independent expenditure committee, it's also a committee generally and a political committee.

The State in its AO has said that it will not be subject to the same types of restrictions that a political committee will be subject to, however, the statute shows otherwise. We don't have any authority to say that the AO will trump the statute. Under the statute it specifically says that our organization, once it spends $750, shall organize a political committee.

You cannot require, you cannot constitutionally require an organization to employ a political committee in order to speak. That was an important distinction in Citizens. They said that PAC is a burdensome alternative. It is not the same thing as an organization speaking for itself. So the fact that Iowa Right to Life has a PAC is immaterial. It's not the same. It's not the same as saying Iowa Right to Life can speak just because it has a PAC. Just because it is complying with restrictions by having a PAC, it's not the same thing.

Citizens United said that an organization must be able to speak for itself, it must be able to use general treasury funds, it must not be subject to these types of restrictions unless it is under the control of a candidate or has a major purpose of nominating or electing a candidate.

Holding this current PAC status unconstitutional will remove confusion and leave Iowa Right to Life as an independent expenditure committee under the statute.

That leads me--

THE COURT: What is the difference between a PAC-style committee, political committee, and an independent expenditure committee under Iowa law? And I am specifically referring to the--you both referred to this, the Iowa advisory--the Iowa Board Advisory Opinion. I think it's--you labeled it 201005, and I think it's 201003, at least that's what Defendants told me.

MS. PHILLIPS: You are right. That was a clerical error.

THE COURT: What's the distinction, in Plaintiff's view, between--I mean, why can't the Iowa law make that distinction?

MS. PHILLIPS: They can, but here they haven't done so properly. Here they are treating independent expenditure committees as political committees. The scheme is confusing. But under 68A.402(9), a permanent organization temporarily engaged in activity that would trigger PAC status, such as making over $750 in independent expenditures, shall organize a political committee.

Under the law--

THE COURT: By the way, Plaintiffs' already has a political action committee, at least the defendants' brief told me that; is that correct?

MS. PHILLIPS: That is correct. However, it's not the same. Citizens said that just because you have a PAC doesn't

mean that that is speaking for your organization. They have complied with PAC registration requirements in the past. They do have a PAC. However, it's not the same thing. Having a PAC is not the same thing as an organization speaking. That's really important to understand that it's not the same thing. It's a burdensome alternative, and Citizens said it's impermissible.

Iowa Right to Life does not have a major purpose of supporting or nominating a candidate, therefore, it itself cannot be a political committee. Here it itself wants to speak and it itself cannot be registered or required to follow these burdens that a political committee has to follow.

That leads me to my second point. Even if we throw away the term political committee and focus on independent expenditure committee, independent expenditure committees have certain requirements that they have to follow. This includes registration within 48 hours. They have to file an initial report at the same time, within 48 hours. They have ongoing reporting requirements. They have to terminate. In order to terminate they have to bring their balance to zero, file a report with the Commission--with the Board. The Board has to approve their termination. Until the Board approves it they still have ongoing reporting requirements.

These are PAC-style requirements. These are the types of requirements that the Court was talking about in Citizens

United, 898. It lists off these onerous burdens, these burdens that are only permissible if they are applied to the types of organizations that do this on an ordinary basis. They have the major purpose of doing this activity.

Here, the Government does have an informational interest. Again, disclosure is not bad. However, their informational interest is met by less restrictive means. Here an alternative would be event-driven reporting, you only report when you do something. It would be information satisfied by disclaimers. They have disclaimers, that's fine.

Here there is ongoing reporting. You have to report even if you are not doing anything. You have to register in order to speak. You have to terminate when you decide that you no longer want to speak. These are onerous burdens, these are PAC-style burdens.

Again, the state references Citizens United and Doe to support its certification that these are just disclosure requirements. However, in those cases the Court upheld the type of disclosure that I talked about at the beginning, the event driven, the on ad disclaimer requirements. Not these PAC-style, ongoing registration termination-type requirements.

Furthermore, if the requested relief is granted, Iowa will retain a disclosure system. They will have what has been approved by the federal system, which is event-driven reporting. You don't have to report if you haven't done anything, you only

report if you do do activity.

The other restrictions at issue here is the prior board approval. This is a content-based restriction on speech. This is subject to strict scrutiny. Furthermore, such content-based restrictions are presumptively invalid. It is rare that requiring--that a regulation restricting speech because of its content will ever be permissible. That's U.S. v. Playboy, page 817, from 2000. Board approval is not required for any other expenditures, it's only required for political expenditures. This is impermissible.

Furthermore, it singles out particular speakers. The term in the statute says entity, however entity is not defined clearly. If you look at the form, the actual piece of paper that the organization will have to see, it says if this was made by a corporation then declare that the board of directors approved this measure.

The fact that-- Again, this is like the fact that Iowa Right to Life has a PAC fund. To find that these burdens can be met, the fact that it's only a piece of paper or only one approval at the beginning of a year, does not take away the fact that this is unconstitutional. Even modest encroachment on freedom, if accepted in small increments, leads to a loss that would be unthinkable if inflicted all at once. Courts must be vigilant against modest emulations of speech as they are against its sweeping regulations.

Furthermore, the State claims that this prior board approval protects shareholders. However, shareholders are already protected by the corporate law. Furthermore, this doesn't protect shareholders, it requires approval from the board of directors, not from the shareholders, so that interest has already been met and is not met through this type of regulation.

Finally, Iowa's corporate contribution ban unconstitutionally burdens speech. This is subject to strict scrutiny as it is an outright ban. It is a severe burden on speech. That's from Citizens 897, 898. The State says that this issue was reserved by Citizens United or untouched. However, it is not before the Court in Citizens United.

Citizens changed things. It said that a corporation cannot be required to employ a PAC to speak. That's what Beaumont was talking about. Beaumont said that a corporation can speak because it has this PAC. So it can give contributions through its political committee, and that's sufficient. However, Citizens threw it out the window and said that PACs are not an alternative. PACs cannot speak for an organization. PACs are separate.

Again, this is also content based. It only prohibits political contributions. It's defined by content. That's U.S. v. Playboy, 812. The First Amendment hostility to content-based regulation extends not only to restrictions on a

particular viewpoint, but also to prohibition of public discussion of an entire topic. The fact that it doesn't prevent contributions to a particular type of candidate is irrelevant. It prohibits contributions wholesale.

An important thing in the State's brief, they said--they quoted Austin to say that there were differences between corporations and labor unions because of the antidistortion interests, among other things. This argument is irrelevant because the antidistortion interest was thrown out by Citizens.

Therefore, because Plaintiff has shown likelihood of success on all of the merits, because there is irreparable harm, because the balance of equity tips in the favor of Plaintiff, because the public interest is in Plaintiff's hand, there is--it's never in the public interest to violate the Constitution, the fact that we are close to an election is irrelevant, this preliminary injunction should issue.

THE COURT: Okay. Ms. Phillips, when I read your papers you make no citation to Data Phase, nor to Rounds . When I have an injunctive request, when I started my job 13 years ago, my predecessor, for whom I have a lot of regard, told me you should only grant an injunction where there is a nuclear explosion threatened because what you are doing is you are speeding up the process that you lawyers work by. There is no discovery. You're--even at the end of the case you're guessing

whether there's full discovery, et cetera, et cetera. You have got to give me some Data Phase analysis.

Additionally, it seems to me the Court of Appeals changed the analysis substantially last year in Rounds when they tell me when you've got a legislative act--and I noted in one of your papers, either you or the defendant told me that the Senate had passed 49 to 1, and in the House it passed 98 to 0. Judge Grunder, when he wrote Rounds and reversed the District Court, used very strong language about interfering with the legitimate role of the Legislature. I can't recall exactly what it was, but it was, I think, an admonition to district courts, and yet I saw nothing in your papers about Rounds, the democratic nature of the statute.

The other thing that I read from the cases is that, I'm going to hear from Mr. Thompson on this, of course, is it does seem to me there are a number of important facts that, other than your say so, I have nothing to go on.

The major political committee question. In fact, I read Chief Judge Gonzalez, this is a case from the District of California, Southern California, she says, quote, "Both the Supreme Court and Ninth Circuit stressed the importance of factual development in reviewing First Amendment challenges to campaign finance laws," declining to rule on constitutionality.

You know, tell me, am I just supposed to accept your facts, No. 1; No. 2, why is there no reference in your papers or

here today about the Data Phase analysis that I'm bound to engage in?

MS. PHILLIPS: As to the last question about the facts, this was a verified complaint, so these facts have been verified. There's no discovery that will get more facts or get different facts. Really the only facts at issue are what Iowa Right to Life wants to do, and that information is in Iowa Right to Life's control. Iowa Right to Life has verified those facts.

Everything else before you is a legal matter.

THE COURT: Okay. Wait a minute. I think the Massachusetts case said, and you cite this, you tell me that the Court should look at the, quote, organic documents and how it spends the majority of its disbursements. I just take your word for it? The defendants aren't entitled to inquire as to any of that?

MS. PHILLIPS: The organic documents are cited in the brief, they are available online, it's available through the Secretary of State's website. Its Articles of Incorporation that says that their purpose is to promote value of life and educate the public, and that's spelled out in their Articles of Incorporation, in their 501(c)(4) organization. They are bound by the fact that they are an educational institute. That's their purpose.

As to the preliminary injunction factors, we should have discussed the cases, the Eighth Circuit cases that you

brought up and that the defendant brought up, and we would have in a reply, and that was an oversight. However, we do focus on the Supreme Court cases that have said that while preliminary injunction may be an extraordinary remedy, it is not extraordinary where free speech is at issue. That's Ashcroft versus ACLU. That's a 2004 Supreme Court case.

We also rely upon the supremacy clause, the fact that we want the Constitution to be upheld. The Constitution is a status quo. The challenge law has been in effect since April. The Constitution has been in effect since 1789. That's something that we rely on.

Regarding the balance of harms, this is a quote from the Sixth Circuit case--no, I'm sorry--September 9, 2010, Kentucky case, "The harms and difficulty of changing a regulation cannot be said to outweigh the violation of the constitutional rights it perpetrates. It would be far worse that an election continued under an unconstitutional regime than for the registry, for the State to experience difficulty of expense and altering that scheme."

"It is well known," Citizens said this, "It is well known that in an election that the electorate pays attention to elections in the weeks leading up to it." Therefore, this is the time for Iowa Right to Life to speak. This is the time that it realized that it can't speak.

THE COURT: Ms. Phillips, the law was passed in

February and March, the regulations were promulgated in April. You don't file your lawsuit until September 7th. Now it's an emergency. What happened between the passage of time that you didn't file your lawsuit?

MS. PHILLIPS: Well, this is the time that Iowa Right to Life wants to speak. It didn't want to speak back in April. That's not when the people are paying attention to the election. Candidates hadn't been decided yet.

THE COURT: Well, understanding that it takes the District Court some time, the defendants are entitled to due process. If you intended to speak in September or October, why didn't you file your lawsuit in March or April?

MS. PHILLIPS: Because in March and April we didn't even know who the candidates were. It was not a concrete issue yet. When we say we want to speak about this attorney general race, the primary hadn't even happened yet, so how do we know that the issues would be this important? How could we know that our organization wanted to speak?

THE COURT: Google tells me Ms. Finley announced in January. Google is never wrong.

MS. PHILLIPS: That's true. That's true. That's true. However, to require an organization to think months and months ahead before it wants to speak is not what our country is all about. To require the organization to register before it wants to speak is not what our country is about. This is about

free speech. This is a core fundamental right. This is the time that our organization wants to speak. This is the time that they are not allowed to speak. That's why we're bringing this case now.

If we had known about the fact that we wanted to speak back in April we would have brought it back in April. But then it might have been too far away from an election, it might not have been concrete enough. This is the time. We're in the weeks leading up to the election. We know it's close. We know this is--

THE COURT: Well, Ms. Phillips, let me ask you, I think the regulations by the Iowa Board have been in effect, at least the defendants brief told me that they were allowed to be promulgated immediately. They had emergency rules. They've been in effect since April. We're now 50 days away from the election, or something like that.

Why should I change the rules that every interest group, political party candidate has operated on since April with a statute that's entitled to, at least the Court of Appeals tells me, legitimacy, and change the rules seven weeks before the election?

MS. PHILLIPS: Respectfully, Your Honor, it is your job to uphold the Constitution. I understand that this--this law was passed unanimously, however, it's unconstitutional. It was unconstitutionally passed. You are the champion of the

Constitution. Ordinarily deference is shown to the Legislature, but here they got it wrong. They are infringing on First Amendment core rights. Therefore, it doesn't matter--the reliance interest isn't there. Our clients are relying on you, we're relying on you to uphold the First Amendment and allow Iowa Right to Life to speak. That's what's at issue here.

There is no Wild West situation. There still will be disclosure, and I think that's really important. There still will be disclaimers, there still will be event-driven reporting. This is the type of disclosure that was upheld in Citizens. Now we remain, the scheme is there.

If the relief we ask for is granted, the only things that will be taken away are these onerous burdens, the registration, the ongoing reporting if you're not doing anything, and the termination requirements. Therefore, the core--the disclosure will still be there, the Government's informational interest will be met by what will be remaining if their request for relief is granted.

THE COURT: Anything else, Counsel?

MS. PHILLIPS: No.

THE COURT: All right. Mr. Thompson.

MR. THOMPSON: Thank you, Your Honor.

THE COURT: Mr. Thompson, I don't know if you intend to respond to either of the--in addition to the request for preliminary injunction. I have her motion to, Plaintiff's

motion to expedite and consolidate, and you didn't respond to those. I'm assuming that you are going to orally tell me today, or perhaps ask for some time with respect to the other two motions that, at least the way I read the pleadings, are unresponded to.

MR. THOMPSON: Your Honor, it may be a misunderstanding. On the scheduling conference we had with your staff on Friday we talked through the issue, and it was our understanding that the only things set for today was the expedited request for hearing on this.

To answer your question, I am happy to respond to both of them verbally. I think that--

THE COURT: You needn't do that. I tell you what I get, I always have Plaintiff contact Defendants because I try to treat these with the seriousness they are entitled to. If you agreed with my law clerk or my judicial assistant that we're going to limit this to the preliminary injunction, that's fine. I frequently learn things from both. I didn't know about it.

MR. THOMPSON: Just to be clear, Your Honor, that's why we didn't file a written response. They are very succinct motions. I am absolutely prepared to discuss both of those with you. In fact, anticipated doing so.

THE COURT: Okay.

MR. THOMPSON: I can do that now or we can take it up after.

THE COURT: No, I would rather hear you on the Data Phase analysis and on her claim of irreparable harm because I think that's the priority that the law gives those factors.

MR. THOMPSON: Thank you, Your Honor. At the risk of short circuiting all of the things I planned to talk about, let me focus on that if I could.

As you pointed out, as you've observed, preliminary injunction is an awesome power. I think in discussing the Rhodes case or the Planned Parenthood case you point out that even after Data Phase the Eighth Circuit has made clear that it's particularly awesome in the context of challenges to statute that were enacted in accordance with our democratic processes.

In Rhodes the Court emphasized not only that the standard for likelihood of success was higher in those types of cases, but that in doing the analysis to look at the merits the Court should apply a deferential analysis and that there should be a presumption of validity to the act of the Legislature in this case, or the interpretation of the statute by the agency in this case, and that such a statute should not be enjoined lightly.

We believe that that framework, together with the timing of this filing, is, as the Court has pointed out, frankly, would permit this Court to dispose of this motion without going into the detailed analysis on the merits that form

the basis of most of Plaintiff's argument. I will get to that in a moment.

The other thing that this Court has pointed out is that, and it's well settled law, that the purpose of a preliminary injunction is to maintain the status quo. As the Court correctly pointed out that if on April 9th, after Governor Culver signed this bill into law and it became the law of Iowa, somebody who was focused on their--on protecting their rights filed a lawsuit to enjoin the application or the implementation of this law so that it doesn't have the effect of chilling their speech, as alleged in this case, then I think you and I would be having an entirely different discussion this morning.

The facts that are undisputed and in the record are not that. Citizens United, as you point out, was decided in January of 2010. We'll get to the merits, but Citizens United addressed a number of things. It didn't address direct contributions. It specifically upheld disclosure.

In response to Citizens United the Iowa Legislature acted promptly to conform Iowa law to the change in the law. Overwhelmingly passed amendments in March, signed into law in April, enacted emergency rules by mid-May. Over the five months that have passed since then, as you point out, in an election year, candidates, voters, the public, the State, has conducted a statewide, hotly contested general election in the context of this new law.

During this time some folks have--the commission--Again, let me detour for a second. You've also pointed out the need to develop a record here. I think we will get to that. I think there is a real problem with the factual record here. They don't get to just ask for a preliminary injunction on allegations, they have the burden, they have to establish the element under Data Phase.

We have submitted to the Court a detailed affidavit of Charlie Smithson that sets out the factual issues that I'm about to discuss with you, so it's not just Jeff Thompson, it's in the record, and it's in the record from the official in Iowa who is charged with the administration and interpretation of this statute.

Over this five-month period parties seeking--have sought advice. There is a mechanism in place to seek advice. Some sought advice. Some sought informal advice, some sought formal advice. The mechanism provides that the formal advice, the written opinion is a defense to prosecution.

We also know from the record that the plaintiff in their own verified petition alleged that they called Mr. Smithson to ask about this and that he didn't give them a clear answer. It's undisputed that they didn't ask for a formal opinion. This is back in February.

It's also undisputed in the record, documents are attached to Mr. Smithson's affidavit, that although this

Plaintiff did not seek a formal opinion, counsel of record for Plaintiff sought formal advice, which is the opinion that you are referring to, Your Honor, the '03 opinion, on behalf of another client that expressly states the contrary to this confusion argument that this Court is hearing. If you want to make an independent expenditure, you don't have to be a PAC, here are the only things you have to do.

The record in this case is a little bit different than the factual allegations being made, and also certainly are not the type of facts that support a timely action to protect First Amendment rights.

Last week they filed a lawsuit against the expedited disposition on the merits seeking to consolidate, seeking to get this Court to decide by October 8th, which is, as you point out, a deadline provided by Plaintiff. There's absolutely nothing in the record that indicates that there's anything significant about October 8th for any reason. The closest thing we have to evidence that's meaningful in any way is Plaintiff's counsel's allusion to the Citizens United case, the case that discusses the importance of contributions in the October window.

THE COURT: Mr. Thompson, the way I get--let me interrupt--the way I get Ms. Phillips' response to all of that is these are core constitutional values and that despite the lack of what you claim is a sufficient thing, factual record, and the other factors you have referred to, the regulatory

advice, et cetera, et cetera, is that it doesn't matter. The priority given the First Amendment is significant enough that I should err on the side of giving them relief because these are burdensome requirements.

MR. THOMPSON: Well, let me answer two steps to that.

THE COURT: Right.

MR. THOMPSON: No. 1 is the very issue of burdensomeness isn't necessarily simply a legal conclusion. In other words, there's some factual development necessary about whether, in fact, these are burdensome. Whether they are or not, that relates to this chilling argument. That's where, frankly, we argue the fact that this very entity has set up a PAC themselves already and the documents will reflect that.

I have got an additional exhibit to add that it is the same treasurer for both entities and that the address of the PAC is the address of the chief officer of the corporation. The idea that these are arms length issues here, I think, is not supported by the record.

In an as-applied analysis, Your Honor, the idea that this particular Plaintiff is somehow prevented or chilled from making a contribution that they absolutely positively want to make by October 8th, is factually just not demonstrable, and, in fact, it's belied by the facts. In fact, their most recent filing, the Iowa Right to Life PAC filing in July of this year reflects that they, in fact, have $950,000--$950--they wish they

had $950,000.

THE COURT: There is a difference.

MR. THOMPSON: --in their bank account and they've already complied. They've already registered. They've already done all of the reporting, and they have the money there. If they really wanted to engage in speech through their PAC, they could.

The other thing is it's clear from the advisory opinions and the statute, just a plain reading of the statute, that if they want to engage in the very same conduct outside of their PAC, all they have to do, and these are the two things that they put into the record, in addition to the verified complaint, are the forms, and we've talked about the forms in our response, is to fill out the forms on the Internet, and it includes seven pieces of information, and send off the check or buy the materials.

Yes, it kicks in ongoing reporting obligations. We agree with that. But as we get-- We can look at the legal precedent. The standard for disclosure and registration and implementation of those things is, No. 1, it's not narrowly tailored. This other standard which they've now agreed to, which is the exacting scrutiny standard, and the courts have, in the Doe case that we cited, have made it clear that the states are to be given wide latitude in--actually, the language in Doe is significant flexibility in how to implement these voting

systems and these requirements, and that they are going to be given substantial latitude in how to enforce the registration, and reporting is not onerous.

THE COURT: Mr. Thompson, I was fascinated-- I didn't know this. I read your brief. Did you tell me in your brief that Justice Thomas, he wants to throw out--when you were telling me about how the Court upheld the disclosure requirements, the law, and that these were disclosure requirements, does Justice Thomas' opinion say that--Justice Thomas' opinion was the law, there would be no disclosure requirements? Is that what you told me in your brief?

MR. THOMPSON: Well, he dissented from part four of Citizens United. He was the sole dissent to that part. He disagrees. He's dissented in previous opinions on this issue, that the disclosure requirements should be subjected to a different level of scrutiny, No. 1, and, No. 2, therefore, applying the argument that Plaintiff argues, you would apply strict scrutiny narrowly tailored and you may, depending on the facts, reach a different result.

In Citizens United it's clear that he, on those facts, would have said that the disclosure requirements were too onerous. But keep in mind that those are the very restrictions that eight of the justices said were not too onerous. That's the law. I think, yeah, there's his dissent in that case. He also dissented in the Beaumont case, which is part of the

argument here really buried in it. They are asking you, when we get to the contribution part, to accept that argument that the Citizens United case impliedly overrule Beaumont and the national right to work cases. There is a series of cases that deal with direct contributions that were expressly discussed in Citizens United.

THE COURT: Okay. My question took you away from what you were telling me about Doe. You say that Doe permits the states significant flexibility in meting out disclosure requirements. If I recall the facts in Doe, it was from Washington and it was the--didn't a court give Plaintiff an order of nondisclosure saying he didn't have to disclose the signers of a referendum?

MR. THOMPSON: Referendum petition, correct.

THE COURT: In any event, why don't you tell me about significant flexibility. This is from 2010, isn't it, Doe?

MR. THOMPSON: That's correct. First of all, it's very important that in 2010 Doe makes it clear that Citizens United did not change Buckley or the line of cases in terms of this exacting scrutiny, No. 1. No. 2, you know, the standard is a substantial relationship to a significantly important government interest.

Then the case goes on to say that the Government interest here involves the ability to run your own election system and that that, by definition, implicates flexibility and

latitude in deciding how to implement. In other words, we are not going to micromanage the form or whether you call it a disclosure, or registration, or whether you put it together.

The interest that's being protected is the interest in the information and the ability to gather information, disclose it, make it available to the voting public. I think that clearly under Doe, you know, this disclosure and the corresponding registration step, which sounds onerous, but it's nothing other than you have got to put your name in the system in order to make the disclosure, are clearly not the type of restrictions that Citizens United was talking about.

You can look at Citizens United. You can also go back to the Massachusetts Citizens for Life case where there were distinctions drawn about the types of things that were required of PACs, and things that were required of people wanting to just make independent expenditures. Those cases look an awful lot like the distinction that the Iowa law makes.

One of the things, Your Honor, that we prepared with the Court's permission, if I could approach, I would like to mark as Exhibit 2 to this proceeding, is really a summary. It's a summary of the statutory provisions that apply to independent expenditures and then PACs under Iowa law. That kind of simplifies this discussion a little bit to compare.

Rather than standing and reading through the statute, Your Honor, I would offer this just as a summary of the

voluminous information, but it's all cited to the statute.

THE COURT: Ms. Phillips, does Plaintiff object?

MS. PHILLIPS: No, Your Honor.

THE COURT: It will be received.

(Defendants' Exhibit No. 2 was offered and received in evidence.)

MR. THOMPSON: This gives kind of a contrast. As you follow through this idea of PAC-like or PAC status, what this illustrates is the difference under Iowa law. I also believe that it's clear upon just a facial reading of the statute that it's not confusing. That if you just want to make an independent expenditure all you have to do is fill out the form and spend the money. If you want to make it and do nothing, you just have to spend $749--actually, $750, because it's $751 where the issue kicks in. There is a quantum that kicks in on the disclosure requirements. Below that there is absolutely no limitation, and the law makes that clear.

Going back just for a moment to the Data Phase discussion, because I think that one of the things that I think is important, and I want to make sure we're very clear about, is one of the things that Rhodes did in addition to kind of heightening the standard as to challenges to statutes, which is good for me, it also made it clear that in the context of a constitutional challenge that the Court needs to look at the merits, and that the determination on the merits could well be

all you need to do. If the movant doesn't satisfy this higher burden of likelihood of success on the merits, then you don't need to get to the other balancing factors.

THE COURT: So if the first factor is not a, quote, close case, a guess, then the other three factors needn't be analyzed?

MR. THOMPSON: That's what Planned Parenthood or Rhodes says. You don't have to get to the other factors if the plaintiff has failed to sustain their burden on the likelihood of success.

THE COURT: And the--did the Court of Appeals quantify, in your view, the difference between likelihood of success on the merits and winning the case? I mean--

MR. THOMPSON: When you read it--the answer is I think they tried, but they also tried not to do it in a way that is going to be treated as black letter law. They did two things; they talked about fair chance of success, which is the Data Phase standard, and made it clear that the courts had interpreted that as kind of less than 50 percent. It didn't have to be more likely than not.

THE COURT: Then they go on to use the phrase rigorous standard.

MR. THOMPSON: Right. There were two lines of cases under the Eighth Circuit; there was the rigorous standard, there was the fair chance juris prudence. In the case of at least the

statute, they brought it together and they said, no, we're going to be clear, it's got to be likely, they are likely to succeed on the merits. Then in a footnote they refer to some cases, without expressly adopting them, that says likelihood has been evaluated as being more than 50 percent.

My argument, Your Honor, would be it's no different than actual success on the merits in a civil case, which is by a preponderance of the evidence. They've got to persuade you that they win.

Now, I don't think they can do that for a number of reasons. Before we go to that, let me go to the follow on question to this Rhodes discussion, which is even if they would persuade you that there was likelihood of success on the merits, does that mean, does that mean it's game over? I think Rhodes makes it clear that that's not the case.

Even where the Court decides there is a likelihood, then the Court must consider the other Data Phase factors, which is the balancing test, the public policy, the irreparable injury.

One of the things that I will concede to make this simple is that the juris prudence is pretty clear that if you decide there is likelihood of success on the merits on a constitutional injury, that the law is pretty clear they don't have to put some evidence in the record of damages, that that is an injury that's irreparable.

THE COURT: That's the Phelps-Roper case that counsel cited.

MR. THOMPSON: Yes, Your Honor. I think that's well established. But the other factors still argue in favor of refusing to exercise your extraordinary power here. Those factors are the balancing of the equities. And when you look at that factor, as we pointed out, that is an equitable proceeding. They are asking you to exercise your equitable power. The law says that the point of the equitable power is to preserve the status quo.

In this case they are absolutely asking you to upend the statute. They're asking you--this is the discussion we had about the April lawsuit versus September lawsuit. They had their chance in September, you know. They're asking you to change the status quo, which in equity is not what a preliminary injunction should do, and for that reason alone you could say no.

Then when you look at the public interest, this, as you point out, is in the context of an election year with a general election, hotly contested state general election, and the idea that because they want to make a $750 independent expenditure now you should upend the rules for everybody else certainly cuts against the public interest particularly.

Again, in an as-applied thinking process as to this Plaintiff, they already have a PAC, they've already got money in

the bank. They could have done this a long time ago and still filed this lawsuit challenging the non-PAC pathway.

THE COURT: Mr. Thompson, Plaintiff's counsel do these cases across the country, and I know the attorney general from having the Attorney General's Office defend litigants here before me, you have association with other attorneys general. Is it a safe surmise on my part to say that many, if not all of the 50 states reacted to Citizens in some way?

MR. THOMPSON: Yeah. Yes.

THE COURT: Okay. And do you know, because I'm sure Ms. Phillips or Mr. Haynie can probably tell me as well, but do you know, have any of the reactions, if we can call it that, that legislatures have had to Citizens resulted in district courts or courts of appeal striking down the reactions?

MR. THOMPSON: As far as I know, and we are obviously trying to gather information in a very short time window here--

THE COURT: Right.

MR. THOMPSON: --it's my belief that there is a Minnesota case that was filed that there was some preliminary relief granted. It was filed as to a law that existed prior to Citizens United and challenged provisions that had not been conformed, if you will, to the law.

As far as I know there is no current decision where an attempt to conform has been successfully challenged. I could be wrong. We're not aware of one. We're aware that other lawsuits

have been filed, in fact, by the same plaintiff, but I don't have the benefit of all of those details.

THE COURT: I know there is no legislative history here, at least in the papers that you and Plaintiff have submitted. The change to Chapter 68A, was it in reaction to Citizens?

MR. THOMPSON: Absolutely. Although, unfortunately for you and for me, the Iowa Legislature doesn't really make a legislative history like you are used to in a federal statutory case. The only thing we have is something called the bill explanation, which in this case doesn't deal with it.

In Charlie Smithson's affidavit, which is in the record in this case, he described the process and makes it clear that this was done on an expedited basis in an attempt to conform Iowa law to the changes in the law brought about by Citizens United.

In the Data Phase analysis, other than the merits, I still-- I know the Court is going to take seriously its duty to look through these things and analyze this. I think, as a matter of law, even without analyzing the merits, you could and should deny this request for preliminary relief.

As to the merits, again, we briefed it. Let me make just a couple of points that I think are the most important and then we'll--I will see if you have any questions. The plaintiff's entire arguments, whether they are--are built on two

different premises. Both of the premises are just wrong. The first premise is based on the statement that Plaintiff's counsel made about what Citizens United did. They declared, made a declaration about corporate forum that then would, would and should effect decisions, you know, not before the Court. They issued some kind of advisory opinion that binds you and everybody else to change the law that touches any of these issues. No. 1, they didn't do that.

No. 2, they can't do that. That's not what the Supreme Court does. They are always very cautious to only take on the issue that is before them, and have made it absolutely clear that that is the limitation on their precedent.

Citizens United, the change in the law, dealt with the treatment of independent expenditures and said that they are corporate speech. They couldn't force PACs to--I'm sorry--corporations to do it in a way that infringed upon under the strict scrutiny analysis, which we agree applies to independent expenditures, prohibition or limitation.

What they didn't do is address direct contributions, they expressly didn't do that. They expressly affirmed the line of cases, the Buckley case, and others, that dealt with the distinction between direct contribution and independent expenditures as a matter of substantive law that they are different by nature. The Doe case confirms that--I'm sorry, not Doe case, there are other cases that confirm that.

The other thing that it did absolutely is that it upheld disclosure and registration requirements as to the same independent expenditures applying the exacting scrutiny test. What Plaintiff is trying to do, and what I think is a creative argument, but is a wrong argument, is trying to boot strap one part of that decision into the other and argue that somehow this exacting scrutiny now applies to every step of this process, and they do this by evoking this concept that everything Iowa does turns Iowa Right to Life into a PAC.

That is wrong both as a matter of law and as a matter of fact. Upon its face the statute doesn't do that. You can read it. It's very clear. Exhibit 2 breaks down the differences between the two. They claim confusion, chilling effect due to this confusion. Yet on the facts of this case, in an as-applied analysis, this very Plaintiff knows the difference. They fill out paperwork, they fill out a form. They've done the disclosures. They have got money in the bank.

They have told you, Your Honor, they are here because they have chosen not to make this speech, this independent expenditure, they want to make it outside the scope of their PAC. Any argument to this Court that they are confused about what's PAC and what isn't is, frankly, disingenuous and certainly not supported by the record.

Then they boot strap all of that into a strict scrutiny analysis, which doesn't apply. It's the wrong analysis

applied to facts that are just not consistent with the record.

The contribution plan--or the contribution ban, I think they are, again, arguing, I think they told you that although they conceded that this was not before the Court, that somehow Citizens United changed the law. That's just not true. And when we look at subsequent cases it's clear that if there is district court cases that followed, there's-- Perhaps the most important thing that I think, buried in all of this, is the Beaumont case. I guess they are arguing that Citizens United impliedly overruled Beaumont. I can understand why because they were the plaintiffs in the Beaumont case, too. The Court didn't do that, and they are here making out the exact same arguments that they made to the U.S. Supreme Court in the Beaumont case that were rejected, and to which Justice Thomas dissented, as you and I talked about.

On the merits, if you work through the merits on this, as we invite you to do, the brief deals with these issues very specifically, again, basing that analysis on the record, basing it on the statute and the plain reading of the statute, we believe you will reach the conclusion that Plaintiffs' can't satisfy their burden to show likelihood of success on the merits.

Just to make sure the record is complete, I've got one other thing--actually, two other things I would like to offer, if I could. One is the Court asked about the papers, the

Articles of Incorporation for Iowa Right to Life, Inc. I have marked the current version and the current disclosure statement as Exhibit 3 to this hearing.

If I could, Your Honor, may I approach?

THE COURT: Just hand it to my law clerk.

MR. THOMPSON: Do you want a copy, sir?

THE COURT: That will be fine.

MR. THOMPSON: These are the facts that make it clear, as I pointed out earlier, that this entity shares a treasurer with PAC and that the address is the same as--the PAC address is the same as the--1500 Illinois Street, address of incorporation is the same as the chairman, I think, of PAC.

Finally, Exhibit 4 is the actual--of course, I wouldn't have--just so the record is clear on the date of the signing of the bill, Exhibit 4 is the transmittal letter from the Governor with the amendments to the statute that were made on April 8th to conform Iowa law to Citizens United.

THE COURT: All right. We'll mark those serially.

Ms. Phillips, do you have an objection?

MS. PHILLIPS: Hesitantly, no.

THE COURT: Okay. They will be received.

(Defendants' Exhibits 3 and 4 were offered and received in evidence.)

MR. THOMPSON: Your Honor, frankly, unless you have any specific questions I think I've--the brief fills in the

gaps.

THE COURT: Mr. Thompson, I have a copy of the definitions part of the statute. Can you tell me 68A.102, I think Plaintiff made reference to this. Does the--why doesn't that definition apply, the independent expenditures provision constitute an exception?

MR. THOMPSON: I'm sorry?

THE COURT: 68A.102, the definition section.

MR. THOMPSON: Right. I think they apply.

THE COURT: Okay. Well, do I need to use the Administrative Rules to make that determination or do you think on the face that's clear?

MR. THOMPSON: The reference to context perhaps makes it a little bit confusing, but I think on its face it says it applies unless context otherwise requires.

The other thing that I think is important, and I am not exactly sure what the specific issue is, but there is a related question that I think is referred to in at least one of the advisory opinions about this issue of committee. In one of the opinions issued there was a discussion about if you just want to make a contribution--I mean, a direct expenditure, does this reference to committee mean you have to form a PAC, and the expressed advice, the written advice is no, you don't. That's not what it means.

I think that's the whole point of this. If there is

an ambiguity here there is a way to sort that out. Plaintiff chose not to, frankly. The Court ultimately may have to decide, as a matter of statutory interpretation, sorting out some of these issues. Again, that is something that doesn't need to be taken up on a preliminary injunction hearing and certainly on an expedited basis before we've even had an opportunity to answer or plead.

THE COURT: Lastly, Mr. Thompson, do you agree with counsel that there are no factual disputes between you and the plaintiff?

MR. THOMPSON: Absolutely not.

THE COURT: Okay.

MR. THOMPSON: No. 1, as I pointed out, the verified complaint such as it is doesn't include, even if it were undisputed, doesn't include the type of record that they would need in order to sustain the motion that they've moved.

As to the verified complaint, let me see if I can grab it real quick. I have got it marked. There are several things that they allege that I think create fact issues. In fact, one of the things that we have argued is irrelevant from a legal standpoint, but they've argued that it is, is this question of major purpose. They have made an allegation that, you know, speech is not a major purpose of their organization. The courts have made clear that that is a factual analysis.

I would argue that, No. 1, it's not undisputed because

we have to see what, in fact, their expenditures have been over the course of the organization and quantify it. In fact, in the Massachusetts, I believe Massachusetts Citizens for Life case the Court pointed out that in an as-applied analysis to an advocacy nonprofit, small nonprofit, that this PAC-like status was inappropriate for independent expenditures, but specifically said that that status could change based on how they, in fact, chose to spend their money, and that it could become a major purpose. Which is the source of the answer that they point out from Mr. Smithson that says I can't tell you until you tell me how much money you spend in terms of this PAC question. It's undisputed that if you just want to make independent expenditures there are no restrictions other than disclosures and registration.

There are--they have created a fact issue that's important to resolving this issue by making this major purpose allegation. And then they have also made allegations about, you know, burdens and uncertainty that have caused them to be chilled. Certainly, you know, based on, again, the facts in this case, they are represented by lawyers who have sued--filed lawsuits about this very issue for probably 10 years. That they, in fact, contacted Mr. Smithson that their counsel, in fact, got written opinions for other clients, you know, I think there is a real fact question about whether, in fact, they are really chilled here.

It's clear to me that they could have made this contribution, they could have made this independent expenditure through their PAC had they wanted to do it. They have chosen this path, they have made it clear, and they have chosen this path because they wanted to do it outside their path, and, frankly, Your Honor, it's clear that they have chosen this path because they don't want to make the contribution, they want this lawsuit.

THE COURT: Okay.

MR. THOMPSON: That's all I have, Your Honor.

THE COURT: All right. Thank you.

Ms. Phillips, do you have any rebuttal?

MS. PHILLIPS: Yes.

THE COURT: Ms. Phillips, I know that your law firm is quite involved in these kinds of cases. I assume, and perhaps my assumption is incorrect, you've done cases in other districts of 94 district courts. Same question I had to Mr. Thompson, have most states reacted legislatively to the Supreme Court decision in Citizens United? When I say most, don't give me a count, but is there a lot of change in the state laws?

MS. PHILLIPS: Yes, many have or are beginning to act. Only a few have actually passed.

THE COURT: Have actually passed?

MS. PHILLIPS: Yes, only a few.

THE COURT: Are you involved in a number of those that

have?

MS. PHILLIPS: Yes.

THE COURT: And I will take any help I can get from the lawyers--

MS. PHILLIPS: Sure.

THE COURT: --or other district courts. Have there been any merits or--I know with computer software we can generally find, there is no such thing as an unpublished case. Have you received decisions in your work in other jurisdictions?

MS. PHILLIPS: No.

THE COURT: Do you have some submitted cases--

MS. PHILLIPS: Yes.

THE COURT: --that are similar without binding you that would be helpful to me? Do you have cases that are submitted to my colleagues on the District Court?

MS. PHILLIPS: Yes.

THE COURT: What about the learned people on the Court of Appeals, are they considering any of these?

MS. PHILLIPS: No. Every case is in a district court. Just out of candor, there is a case in the District Court of Minnesota. My firm did have a preliminary injunction hearing and it was consolidated with the merits. No decision has been issued.

THE COURT: Is it the same or similar to this?

MS. PHILLIPS: Similar in that it is a reaction to

Citizens United. Of course, the statutes are different and the arguments are different, but it is probably going to be the first post-Citizens United decision that will come.

THE COURT: Better someone else than me.

MS. PHILLIPS: Just as a point of clarification, throughout the State's argument today they confused my firm with the plaintiff. Just to be clear, the plaintiff doesn't have other cases. This case is not about me, this case is not about Bopp, Coleson and Bostrom. This case is about Iowa Right to Life. It doesn't matter what opinions my firm might have sought on behalf of other plaintiffs. It's immaterial. It doesn't matter. We're here representing a specific client. This client wants to act. That's what this case is about. It's not about advisory opinions issued on behalf of other circumstances.

THE COURT: Right.

MS. PHILLIPS: Just at the onset.

THE COURT: I was looking for some help, I wasn't suggesting that you were a litigant in any way.

MS. PHILLIPS: Sure. Just to be clear, this has nothing to do with us. This is very specific to Iowa, specific to Iowa Right to Life.

THE COURT: Okay.

MS. PHILLIPS: Also, just a couple of--a few points just to share in what's going on here. I want to clarify Citizens United, clarify the standards. Out of candor, I worked

on that case. This--I understand this case. At issue there were different types of regulations. That's a fair assessment, that the PAC-style burdens were subject to strict scrutiny. The mere disclosure, which included in that circumstance event-driven reporting and disclaimers, were subject to exacting scrutiny. Here we're in the strict scrutiny category. This is more than the informational interest merits.

THE COURT: What is an exacting scrutiny? Does that let the District Court or the courts consider more compelling interests of the State? I think that's what I've gotten from the briefs, that this strict scrutiny and the exacting scrutiny lets the fact finder take into account more of what the defenders of the statute would say is a compelling state interest, whether it's anticorporation, quid pro quo, disclosure in general.

I think one of the factors they mentioned was the idea that contributors know where their money goes. Are those all exacting scrutiny rationalities?

MS. PHILLIPS: Those are all factors to consider. However, when we're talking about exacting scrutiny we need sufficiently important interest--it comes down to what the interest is. Just bare bones, it's what the Government's interest is. Here they've conceded their interest is information, that's their interest.

Regardless of what scrutiny is applied, we think it's

strict, but regardless we're talking about informational interest. The federal model shows us that that informational interest is met by lesser restrictive means. It's met by event-driven disclosure. It's met by disclaimers.

Iowa has chosen not to use that federal model that it clearly knows about and goes above and beyond and requires more. It requires you to register before you speak. That's onerous. It requires you to continue reporting even when you don't speak. It requires you to terminate and essentially say you are not going to speak anymore. And then you would have to file another registration if you change your mind.

These are onerous burdens. These are not narrowly tailored to that informational interest. And the fact that the informational interest can be achieved by less restrictive means is very compelling. The fact that there are other ways to do this-- We are not asking you to take away disclosure, we think disclosure is good. We think disclaimers are important. We think that does serve the informational interest, and we think that is important to the public to know who is speaking. However, requiring an organization to register before it speaks, requiring it to submit these forms when it's not even doing anything, is requiring too much.

Just to clarify, the fact that Iowa Right to Life, the fact that Iowa Right to Life PAC exists is not material. Iowa Right to Life wants to speak. Citizens United said that the

corporation can speak, and that a PAC is not speaking. If it's using a PAC, it's not speaking. It needs to be able to use its general funds to speak. Therefore, all this discussion about the same mailing address, it's just a distraction. It doesn't matter. Citizens United was very clear. It doesn't matter that they comply with PAC requirements. By forming a PAC the organization itself wants to speak, and that's what's at issue here.

Also, I hesitate to bring up status quo, but since opposing counsel did, just to be clear, the purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the Court's ability to render a meaningful decision on the merits. Therefore, the--if the current status quo is the cause of the irreparable injury, which is true here, the Court should alter the status quo to prevent the injury. There is no bar to a court granting a PI--a preliminary injunction just because it might disrupt the status quo. That's clear from Sixth Circuit precedent on that, and Ninth Circuit, and in a recent, last week, District Court case in Kentucky that said that the status quo shouldn't be a factor.

Here, and opposing counsel agreed, the issue here is whether Iowa Right to Life has a likelihood of success. Whether these restrictions do burden Iowa Right to Life's constitutional rights, and because they do, the other factors fall in line.

Just to be clear, again, with these new exhibits,

they--they are just distracting the issue. The fact that independent expenditure committees aren't subject to as many burdens as PAC doesn't make them any less burdensome. The fact that they can register the same form as filing their first report doesn't mean that it's not onerous. The Supreme Court said it is onerous. The fact now that it's one page, it's just a distraction.

As my colleague said, wearing a patch on your sleeve may not seem like a huge burden, but it is. The fact that it's one page or two pages or 40 pages doesn't make a difference. The fact that this is infringing on Iowa Right to Life's constitutional rights, that's what matters.

THE COURT: Ms. Phillips, let me ask you, Mr. Thompson made much of Doe versus Reave. I think that's post-Citizens, isn't it?

MS. PHILLIPS: Yes, sir.

THE COURT: When he talked about that the phrase that he used about significant flexibility, it states they have to run their own elections. I assume your reaction to that is, well, it's still a burden of discussion, or do you have any response to his idea that Doe gives rationale to the statute?

MS. PHILLIPS: I would certainly say that Doe doesn't say that the State has a right to infringe on First Amendment rights by enacting its law. It is true that in Doe disclosure was upheld under exacting scrutiny. That type of disclosure,

again, is different. That's part four of Citizens. That's the eight to one portion of Citizens.

We're talking about event-driven, which is reporting that comes about when you do something, or disclaimer. That's different. And Doe is still ongoing. It's back in the District Court to consider more specific situations.

I certainly--there is no way that Doe stands for allowing a state to violate the Constitution. The Constitution is the supreme law of the land. A state can't go above and beyond that and infringe on the rights of Iowa Right to Life here.

Again, major--with regard to the major purpose test, and that applies to Counts 1 and 2, where PAC status can be imposed on organizations that have a major purpose in nominating or electing candidates, or when, just to clarify, that has to do with major purpose nominating or electing candidates, not major purpose of speaking, the major purpose nominating or electing candidates. The Court has said that that can be found by looking at the organic documents, it can also be found by looking at expenditures.

If you look at the organic documents, which the State has now entered into the record, it's clear their purpose is to promote life and to spread information about pro-life issues. It is not their purpose to nominate or elect candidates. The State incorrectly said that the purpose may be to speak clear,

and that's not the standard. The standard is whether they have the major purpose of nominating or electing candidates.

THE COURT: Okay. Thank you very much.

We'll consider the matter submitted. We'll be in recess.

(Hearing concluded at 10:20 a.m.)

C E R T I F I C A T E

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated.

That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 4th day of October, 2010.

/s/ Ann T. Moyna
CERTIFIED SHORTHAND REPORTER